Supreme Court, U.S.
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No. 92-1696

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

JESSE L. COOK,
Petitioner,
v.

CHRYSLER CORPORATION and
LOCAL 110 OF THE
UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL
IMPLEMENT WORKERS OF AMERICA (UAW),
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION FOR UAW LOCAL 110

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Was a timely Petition for *Certiorari* filed as to Local 110, when the Petition names only Local 136, a non-party?

2. Under *TWA v. Hardison*, 432 U.S. 63 (1977), was Local 110 required to abandon the seniority of other employees, or the use of bargained seniority procedures, *e.g.*, a "first-come-first-served" signup book for Friday absences, to accommodate Cook's religion?

3. Was the finding of the trial Court that other accommodations would impose more than a *de minimus* burden on Chrysler, as affirmed by the Eighth Circuit, clearly erroneous under F.R. Civ. Pro 52(a)?

PARTIES TO THE PROCEEDINGS

Petitioner lists the parties to the proceedings below as "Jesse Cook, the petitioner, and Chrysler Corporation and United Automobile, Aerospace and Agricultural Implement Workers Local 136, respondents." Pet. at ii.

As to the Union party, this is incorrect. Chrysler operated two sister plants in Fenton, Missouri. Plant I was represented by UAW Local 136. Plant II was represented by UAW Local 110. Petitioner was on layoff from Plant I. He then chose to take a job in Plant II, under the jurisdiction of Local 110. The resulting loss of plant seniority put him on the Second Shift at Plant II, and so began the events leading to his discharge by Chrysler. Local 110 filed the grievance at issue, and was the Union party in both the District Court and the Eighth Circuit. (Pet. App. 1a, 8a, 9a, & 10a.)* Local 136, named in the instant Petition, was not a party below.

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* The original Complaint erroneously sued Local 136. This was corrected in the Amended Complaint, which named only Local 110. I Appellant's Appendix at 7. The November 25, 1987 docket entry in the District Court recited ". . . Local 110 in substitution for the deft. Local 136 previously named (by error) fld." I Appellant's Appendix at 2.

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
COUNTERSTATEMENT OF THE CASE	2
ARGUMENT	6
I. NO TIMELY PETITION AS TO LOCAL 110	6
II. *TWA v. HARDISON* IS NOT IN NEED OF GLOSS OR REVISITATION	6
III. *DE MINMUS* COST & RULE 52(a)	8
CONCLUSION	9

TABLE OF AUTHORITIES

Cases: Page

Torres v. akland Scavenger Co., 487 U.S. 312 (1988) 6
Cook v. Chrysler & UAW Local 110, 981 F.2d 336 (8th Cir. 1992) 1, 5
Cook v. Chrysler & UAW Local 110, 779 F. Supp. 1016 (E.D. Mo. 1991) 1, 4, 5
TWA v. Hardison, 432 U.S. 63 (1977) ..... ii, 5-9
Wilson v. NLRB, 920 F.2d 1282 (6th Cir. 1990) 9

Statutes and Rules:

Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e-2(a), (c) & (h) 2
Federal Rules of Civil Procedure, Rule 52(a) ..... i, 5, 8

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BRIEF IN OPPOSITION FOR UAW LOCAL 110

Local 110 of the United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), by counsel, respectfully pray that the Court *deny* the Petition for Writ of *Certiorari*.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported: *Cook v. Chrysler & UAW Local 110*, 981 F.2d 336 (8th Cir. 1992) (*per* Beam, J.), *affirming* 779 F. Supp. 1016 (E.D. Mo. 1991) (*per* Limbaugh, J.).

JURISDICTION

The Petition asserts jurisdiction under 28 U.S.C. § 1254(1), to review a judgment under the religious discrimination provisions of Title VII, 42 U.S.C. § 2000e-2(a), (c) & (h). The Eighth Circuit's judgment was entered December 7, 1992, and rehearing denied January 21, 1993. This Petition was filed April 21, 1993.

Local 110 respectfully submits that, as to Local 110, no timely Petition has been filed. Under Rule 13.1, a Petition is *only* timely if it is filed "within 90 days after the entry of the judgment." Both the caption and the body of the Petition name "Local 136", which is not a party. Local 110 is *not* named, although it was substituted in the first days of the litigation at Petitioner's own instance.

COUNTERSTATEMENT OF THE CASE

The best statement is that of the Eighth Circuit, relying on the District Court's trial findings.[1] It has the added advantage of being neutral:

Cook was employed on the assembly line at Chrysler's St. Louis plants from 1976 to 1986, when Chrysler terminated him for excessive absences. Cook is a Seventh Day Adventist, whose beliefs prohibit work from sundown Friday to sundown Saturday. His terms and conditions of employment are set by a National Agreement between Chrysler and the UAW, which is supplemented by a local agreement between Chrysler and the relevant Local. Under the labor agreements, seniority is determined on a plant-by-plant basis, and seniority at a plant prevails over seniority with the Corporation. Shift assignments, in particular, are determined by plant seniority.

Cook was on layoff from Plant I, represented by Local 136. He was offered an open job at Plant II, represented

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[1] 981 F.2d 336, 337-38, Pet. App. 1a-3a; and 779 F. Supp. 1016, 1018-22, Pet. App. 11a-18a.

by Local 110. He took the job at Plant II and, because he had no seniority at Plant II,[2] was placed on the evening shift, which worked on Friday nights. He could have retained his seniority if he had remained on layoff until recalled at Plant I.

The collective bargaining agreement provides for a negotiated, no-fault absenteeism policy, known as the Uniform Attendance Procedure. It deals with excessive and chronic absenteeism, providing a six-step system of progressive discipline, subject to grievance and arbitration procedures. Any employee absent more than 20% of his regularly scheduled time is subject to discharge. In addition, the Local Agreement at Plant II (Local 110) was amended to address a particular problem with Friday night absenteeism. Fridays are the most sought for excused absences. The amendment, known as the "excused in advance system" or "book procedure", required that, to get an excused day off on Friday, the employees had to sign up in a book on a first-come-first-served basis.

Cook took the job in Plant II, represented by Local 110, in January, 1986. Because he had no plant seniority at Plant II, he was assigned to the afternoon shift. Cook informed his supervisor of the need for accommodation of his religious beliefs, proposing a shift change, working on Sunday instead of Friday, or a flexible schedule. The matter was taken up with Chrysler's labor relations and Local 110. The Local refused to waive the seniority provisions which governed shift preference and scheduling, as well as the "book" procedure on Friday absences. Chrysler began disciplining Cook and, seven months later, on September 16, 1986, fired him under the Uniform Attendance Procedure. Local 110 filed grievances on each discipline, which Chrysler denied. (A. 555-561)

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[2] Like the Court below, we use "seniority" here to refer to "competitive" rather than "benefit" seniority.

Local 110 sent the discharge grievance to the final step, the Chrysler-UAW Appeal Board in Detroit. The International Union sought reinstatement of Cook, suggesting the use of a "floater" on the nights he was absent, or a continuing excused absence for Friday nights. Chrysler rejected the proposal, and the International Union withdrew the grievance because, on the face of it, the discharge was proper under the Uniform Attendance Procedure.[3]

This litigation followed. After six days of trial, the District Court granted judgment for both Chrysler and Local 110, holding, as to the Local, that "failure to secure for plaintiff the relief he wanted does not evidence a breach of the Union's good faith duty to represent plaintiffs interest."[4] The trial Court held that the "Union had no duty to waive or modify the seniority provisions of the local agreement to the detriment of its members."[5] Refusal to do so, the District Court held, "neither constituted unlawful discrimination against plaintiff or caused such discrimination by Chrysler."[6] As to both Chrysler and Local 110, the trial Court held that the duty of "reasonable accommodation" was satisfied.[7]

As to Chrysler, the District Court went on to find, as a matter of fact: "Other options would require Chrysler to bear more than a *de minimus* cost in order to give plaintiff the Sabbath off."[8] In particular, the trial Court cred-

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[3] 779 F. Supp. at 1021, Pet. App. 18a.

[4] 779 F. Supp. at 1025, Pet. App. 25a.

[5] 779 F. Supp. at 1024, Pet. App. 24a.

[6] 779 F. Supp. at 1024-25, Pet. App. 24a.

[7] 779 F. Supp. at 1025, Pet. App. 25a.

[8] 779 F. Supp. at 1024, Pet. App. 24a.

ited evidence that Chrysler would suffer additional costs both in money and lost efficiency.[9] The use of TPT's [10] or "floaters" would impose additional wage and benefit costs on Chrysler.[11]

This, of course, is exactly why the UAW favored such a solution and Chrysler rejected it.[12] The Union wanted the absences covered, not at the expense of another employee's seniority, but by Chrysler having to increase the complement of employees needed at Plant II to cover absences. The Union's goal was to increase work opportunities, particularly when workers were laid off. Success would, in addition, create a precedent and an opening for future negotiations.

Chrysler had the opposite goal, inspired by the fact that Cook got the full benefit package (as did his replacement) even though Chrysler got only four days of work out of him, rather than a whole week.

The Eighth Circuit affirmed, finding both that the reasonable accommodation was offered. As to Chrysler, the Court of Appeals affirmed the trial Court's factual finding, as not clearly erroneous under F.R. Civ. Pro. 52(a), that any other accommodation would impose more than *de minimus* cost, and so undue hardship under *TWA v. Hardison*, 423 U.S. 63 (1977).[13]

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[9] 779 F. Supp. at 1023-24, Pet. App. 22a-23a.

[10] TPT's are temporary part-time employees. "Floaters" or "pool" employees are regular, seniority employees who are held in a replacement pool to cover vacancies on the line.

[11] 981 F.2d at 339, Pet. App. 5a-6a.

[12] Supp. App. 621-23, 645, 665.

[13] 981 F.2d at 339, Pet. App. 22a-24a.

ARGUMENT

This litigation, like most, is of intense importance to those directly involved. The legal issues, nevertheless, are prosaic, and are cast up in a context which is both fact-specific and otherwise ill-suited for this Court's review.

I. NO TIMELY PETITION AS TO LOCAL 110

The first reason to deny *certiorari* is that no petition has been filed as to Local 110, nor can one now be filed in a timely manner under Rule 13.1. The Petition, both in its caption and text, names only Local 136, a non-party. *Cf., Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988) (use of "*et al.*" in notice of appeal jurisdictionally inadequate designation of appellants under F.R.A.P. 3(c)). Local 110 has been the party since November 25, 1987, when it was substituted on Petitioner's own amendment to the Complaint.

II. *TWA v. HARDISON* IS NOT IN NEED OF GLOSS OR REVISITATION

Petitioner urges that *TWA v. Hardison*, 432 U.S. 63 (1977) had led the Circuits into a confused disarray of approaches, particularly as regards accommodations contrary to (what Petitioner denominates) "non-seniority" provisions of labor agreements. Pet. 11-21.

No such disarray exists, beyond the normal variation of results born of differing facts. Sabbatarian cases, like this one, turn on seniority issues. This is for the simple reason that the key issue is whether plaintiff must work the afternoon shift, and, at least in unionized settings, shift preference is *universally* determined by seniority, directly or indirectly. That is not to say that other provisions of the collective bargaining agreement cannot get entangled. For instance, an employee may walk off his afternoon shift job at sundown, disobeying a direct order. When he gets fired for disobedience to the order,

it hardly means that a non-seniority provision of the labor agreement (*i.e.*, the Shop Rule against that disobedience) precludes a reasonable accommodation.

In like manner, here Petitioner's problem was *not* Chrysler's Uniform Attendance Procedure. It was that, after hiring into Plant II, he simply lacked the seniority to hold the day shift, the only shift which quit work before the Sun.

In *Hardison*, this Court understood this. However a particular provision was labelled, the Court held that fellow employees cannot be made to pay for the religious accommodation of another through loss of their own competitive rights (typically tagged "seniority") under a negotiated labor agreement. The Court's language is broad, not because of confusion about the principle, but because care is always required when describing a factually diverse economy:

> We agree that neither a collective-bargaining contract nor a seniority system may be employed to violate the statute, but we do not believe that the duty to accommodate requires TWA to take steps inconsistent with the otherwise valid agreement. Collective bargaining, aimed at effecting workable and enforceable agreements between management and labor, lies at the core of our national labor policy, and seniority provisions are universally included in these contracts. Without a clear and express indication from Congress, we cannot agree with Hardison and the EEOC that an agreed-upon seniority system must give way when necessary to accommodate religious observances. [*Hardison*, 432 U.S. at 79]

In the fifteen years since *Hardison*, federal courts have had to deal with factually specific issues of whether this or that accommodation was prohibited by the terms of a particular labor agreement. It comes as no surprise that sometimes it is, and sometimes it isn't. Here, a trial established that all accommodations, aside from the Un-

ion's suggested use of "floaters" or TPT's, would violate the seniority provisions.[14] We respectfully submit that such fact-specific inquiries are best left to the trial courts. If there is a split of the Circuits, none of the Circuits has mentioned it.

III. *DE MINIMUS* COST & RULE 52(a)

Finally, there is the issue of whether the use of a "floater" or TPT employee would impose more than a *de minimus* cost on Chrysler.

The short answer is that the trial Court heard the evidence, and found as a matter of fact that real costs were involved. The Eighth Circuit affirmed under F.R.Civ. Pro. 52(a).

These are fact findings of the most routine sort. The only point of mild scholarly interest are the divergent theories of cost accounting and, perhaps, economics. Petitioner requires a "billiard ball" economic causation, *i.e.*, there is no "cost" unless a particular replacement employee was hired and a fixed, temporal monetary cost assigned. The District Court adopted Chrysler's (unsurprising) approach that, if overall I need more people to make cars, and I must pay the same benefits on fewer productive hours, I've been economically injured. Even so, aside from theory, the District Court *did* put a number on the economic injury.

Interesting or not, this Court is hardly the place to resolve competing accounting theories, particularly when the

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[14] The "book" procedure is just another form of seniority. Seniority is, by definition, "first-come-first-served". It is a neutral way to making competitive decisions about allocation of scarce resources, here, time off on Friday. Sometimes the negotiators count the time on a corporate-wide basis, and sometimes on a plant-wide, department-wide, or classification-wide basis. Here, the signup book recorded just another form of seniority, measured by "time in the book", with all employees subject to the same rules.

solution depends on how economic life is lived in a particular industry.

Nor is there any reason to reach out to reexamine the meaning of *de minimus*. The use of a *de minimus* rule is what allowed this Court to avoid the First Amendment establishment issue in *Hardison*. If the required costs of accommodation are only *de minimus*, no justiciable constitutional controversy can arise. A revisitation of *Hardison* on the *de minimus* issue will only serve to resurrect a difficult and divisive First Amendment problem, which for the most part has lain at rest since *Hardison*.[15]

CONCLUSION

For the foregoing reasons, as well as those given by Chrysler, we respectfully ask the Court to *deny* the Writ.

Respectfully submitted,

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[15] The exception is in the area of dues, *Wilson v. NLRB*, 920 F.2d 1282, 1290 (6th Cir. 1990) (striking down the "charity option" provision of the NLRA, § 19, 29 U.S.C. § 169, as an unconstitutional establishment).